

EPA is issuing this Notice of Violation pursuant to Section 113(a)(1) of the Act, 42 U.S.C. § 7413(a)(1). Section 113(a) requires the Administrator of EPA to issue a notice of violation to any person in violation of a SIP. The authority to issue this NOV has been delegated to the Director, Air and Radiation Division, EPA Region 5.

STATUTORY AND REGULATORY BACKGROUND

1. When Congress passed the Act, it exempted existing facilities from many of its requirements. However, Congress also made it quite clear that this exemption would not last forever. As the United States Court of Appeals for the D.C. Circuit explained in Alabama Power v. Costle, 636 F.2d 323 (D.C. Cir. 1979), "the statutory scheme intends to 'grandfather' existing industries; but ... this is not to constitute a perpetual immunity from all standards under the PSD program." Rather, the Act requires grandfathered facilities to install modern pollution control devices when units are modified in such a way that their emissions may increase.
2. The New Source Review (NSR) provisions of Parts C and D of Title I of the Clean Air Act require preconstruction review and permitting for modifications of stationary sources. If a major stationary source is planning upon making a modification, then that source must obtain either a PSD permit or a NNSR permit, depending on whether the source is located in an attainment or a nonattainment area for the pollutant being increased above the significance level. To obtain this permit, the source must agree to put on BACT for an attainment pollutant or achieve LAER in a nonattainment area. These permits impose control technology requirements and/or emission limitations which a source must comply with prior to and during its operations.
3. Part C of Title I of the Act and the PSD regulations implementing Part C, at 40 C.F.R. § 52.21, prohibit a major stationary source from constructing a modification without first obtaining a PSD permit if the modification is major in that it will result in a significant net increase in emissions of a regulated pollutant and if the source is located in an area which has achieved the National Ambient Air Quality Standards (NAAQS) for that pollutant. Part C and its implementing regulations further require that a source subject to PSD regulations install BACT.
4. A major stationary source is defined at 40 C.F.R. § 52.21(b)(1)(i)(a) to include certain listed stationary sources of air pollutants which emit, or have the potential to emit, 100 tons per year or more of any pollutant subject to regulation under the Act. This list explicitly includes fossil fuel-fired steam electric plants of more than 250 mmBTU. See 40 C.F.R. § 52.21(b)(1)(i)(a).
5. 40 C.F.R. § 52.21(B)(3)(i) defines "net emissions increase" as "the amount by which the sum of the following exceeds zero:

(a) Any increase in actual emissions from a particular physical change or change in method of operation at a stationary source (emphasis added); and
(b) Any other increases and decreases in actual emissions at the source that are contemporaneous with the particular change and are otherwise creditable."

6. "Actual emissions" are defined at 40 C.F.R. § 52.21(b)(21). In general, actual emissions as of a particular date equal the average rate, in tons per year, at which the unit actually emitted the pollutant during a two-year period which precedes the particular date and which is representative of normal source operations. Actual emissions are calculated using the unit's actual operating hours, production rates, and types of materials processed, stored, or combusted during the time period. 40 C.F.R. § 52.21(b)(21)(ii).
7. 40 C.F.R. § 52.21(b)(21)(iii) allows the Administrator to presume that source specific allowable emissions for a unit are equivalent to the actual emissions of the unit.
8. EPA amended the PSD regulations in 1992 to allow an electric utility steam generating unit that is implementing a physical change or change in operation to determine whether the change will result in a significant emissions increase by equating actual emissions of the unit following the physical or operational change with representative actual annual emissions of the unit, provided the source owner or operator maintains and submits to the Administrator on an annual basis for a period of five years from the date the unit resumes regular operation, information demonstrating that the physical or operational change did not result in an emissions increase. 40 C.F.R. § 52.21(b)(21)(v).
9. The PSD regulations were incorporated by reference into the Indiana SIP on August 7, 1980. 40 C.F.R. § 52.793 (45 Fed. Reg. 52741).
10. Pursuant to Part C of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21 as incorporated into the Indiana SIP.
11. Pursuant to Part D of the Act, the Indiana SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under APC 19, approved Feb. 16, 1982, 40 C.F.R. § 52.770(c)(24) and 326 Indiana Administrative Code (IAC) 2-1 and 2-3, approved Oct. 7, 1994, 40 C.F.R. § 52.770(c)(94).
12. Pursuant to Section 110(a)(2)(C) of the Act, the Indiana SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). APC 19 and 326 IAC 2-1.
13. The PSD regulations were incorporated by reference into the Ohio SIP on August 7, 1980. 40 C.F.R. § 52.1884 (45 Fed. Reg. 52741).
14. Pursuant to Part C of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as attainment without first obtaining a permit under 40 C.F.R. § 52.21 as incorporated into

the Ohio SIP.

15. Pursuant to Part D of the Act, the Ohio SIP requires that no construction or operation of a major modification of a major stationary source shall occur in an area designated as nonattainment without first obtaining a permit under the Ohio Administrative Code (OAC) 3745-31, approved Oct. 31, 1980 (45 Fed. Reg. 72119) and Sept. 8, 1993 (58 Fed. Reg. 47211).
16. Pursuant to Section 110(a)(2)(C) of the Act, the Ohio SIP requires that no person shall commence construction or modification of any source or facility without first applying for and obtaining a construction permit ("minor NSR"). OAC 3745-31.
17. The SIP provisions identified in this Notice are federally enforceable pursuant to Sections 110 and 113 of the Act, 42 U.S.C. §§ 7410 and 7413.

FACTUAL BACKGROUND

18. Since October 24, 1994, Cinergy has owned and controlled, *inter alia*, PSI Energy, Incorporated (PSI) and Cincinnati Gas & Electric Company (CG&E) as subsidiary corporations.
19. Since October 24, 1994, Cinergy has been an operator, either as a successor to PSI and CG&E, or because of its direct participation in, or control or supervision of, the conduct that lead to the violations identified below.
20. At all times relevant to this NOV, PSI has directly participated in the conduct that led to the violations identified below for the Gibson Plant and the Gallagher Plant.
21. At all times relevant to this NOV, CG&E has directly participated in the conduct that led to the violations identified below for the Miami Fort Plant.
22. Cinergy and PSI own and/or operate the Gibson Generating Station, a fossil fuel-fired electric utility steam generating plant located at East Mount Carmel, Gibson County, Indiana 47670. The Gibson plant consists of five boiler units with 3340 megawatts (MW) total generating capacity. The plant began operating the first boiler unit in 1976, the second boiler unit in 1975, the third boiler unit in 1978, the fourth boiler unit in 1979, and the fifth boiler unit in 1982.
23. The Gibson Plant is located in an area that has been classified as follows:
 - a. For NO₂ and Ozone, attainment or unclassifiable from 1980 to present;
 - b. For SO₂, attainment from 1980 to present;
 - c. For PM, attainment or unclassifiable from 1980 to present.

24. Cinergy and PSI own and/or operate the Gallagher Plant, a fossil fuel-fired electric utility steam generating plant located at 30 Jackson Street, New Albany, Floyd County, Indiana 47150. The Gallagher Plant consists of four boiler units with 600 MW total generating capacity and began operating the first boiler unit in 1959, the second boiler unit in 1958, the third boiler unit in 1960, and the fourth boiler unit in 1961.
25. The Gallagher Plant is located in an area that has the following attainment/nonattainment classifications from 1980 to present:
 - a. For Ozone, nonattainment from Jan. 6, 1992 to present;
 - b. For SO₂, attainment from 1980 to present;
 - c. For PM, attainment from 1980 to present;
 - d. For NO₂, attainment or unclassifiable 1980 to present.
26. Cinergy and CG&E own and/or operate the Miami Fort Generating Station, a fossil fuel-fired electric utility steam generating plant located in North Bend, Hamilton County, Ohio 45052. The Miami Fort plant consists of four boiler units with 1478 megawatts total generating capacity. The plant began operating the first boiler unit in 1949, the second boiler unit in 1960, the third boiler unit in 1975, and the fourth boiler unit in 1978.
27. The Miami Fort plant is located in an area that has been classified as follows:
 - a. For Ozone, nonattainment from January 6, 1992 to present;
 - b. For SO₂, attainment from 1980 to present;
 - c. For PM, nonattainment from 1980 to May 2, 1983, and attainment from May 3, 1983 to present;
 - d. For NO₂, attainment or unclassifiable from 1980 to present.
28. Each of the plants identified above emits or has the potential to emit at least 100 tons per year of NO_x and SO₂ and is a major stationary source under the Act.

VIOLATIONS

Gibson Facility

29. On numerous occasions [REDACTED] Cinergy or PSI, or both, "modified" the Gibson plant as defined at 40 C.F.R. § 52.21(b). These modifications included, but are not limited to, the following project: [REDACTED]
30. Cinergy and/or PSI commenced construction of the modification identified in Paragraph 29 as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and have operated the source as modified through the date of this NOV.

- 31 The modification recited in Paragraph 29 resulted in a "significant net increase" in NOx emissions, SO₂ emissions, or both, as defined at 40 C.F.R. § 52.21(b)(3) and (23).
32. Neither Cinergy nor PSI obtained a PSD permit prior to constructing this modification to the Gibson plant as required by 40 C.F.R. § 52.21 and by the Indiana SIP. In addition, no documentation was provided to the permitting agency of actual emissions after the modification as required by 40 C.F.R. § 52.21(b)(21)(v).
- 33 This modification at the Gibson plant did not constitute "routine maintenance, repair and replacement" and therefore was not exempt from PSD requirements pursuant to 40 C.F.R. § 52.21(b)(2)(iii). This change constituted replacement of a boiler component with a long useful life and involved a substantial capital expenditure. The modification was performed to increase capacity, regain lost capability, and/or extend the useful life of the unit. The utility industry has known that the "routine maintenance, repair and replacement" exemption does not apply to capital expenditures of this nature since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
34. This modification at the Gibson Plant does not fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
35. This modification at the Gibson plant does not qualify for the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because the emissions increase which occurred after the modification resulted from the modification.
36. Therefore, Cinergy Corporation and PSI violated and continue to violate 40 C.F.R. § 52.21 and the Indiana SIP by constructing and operating a major modification at the Gibson plant without first obtaining a PSD permit.
37. The violation has continued from the start of construction of the modification and will continue until Cinergy or PSI obtains the appropriate permit and installs and operates the necessary pollution control equipment to satisfy the Indiana SIP.

Gallagher Generating Station

38. On numerous occasions [REDACTED] Cinergy or PSI, or both, commenced construction of "modifications" as defined by the Indiana SIP, 40 C.F.R. § 52.21, at the Gallagher Plant. These modifications included, but are not limited to, the following individual modifications or combinations of such modifications [REDACTED]
[REDACTED]
39. Cinergy Corporation and/or PSI commenced construction of the modifications identified in Paragraph 38 as defined by the Indiana SIP, 40 C.F.R. § 52.21(b) and have continued to operate the source as modified through the date of this NOV.
40. Each of the modifications recited in Paragraph 38 resulted in a "significant net increase" in SO₂ emissions, 40 C.F.R. § 52.21(b)(3)(i).
41. For each of these modifications that occurred at the Gallagher Plant, neither Cinergy nor PSI obtained a PSD permit pursuant to 40 C.F.R. § 52.21, nor a minor NSR permit pursuant to IAC 2-1. In addition, no documentation was provided to the permitting agency of actual emissions after the modification, as required by 40 C.F.R. § 52.21(b)(21)(v).
42. None of the modifications at the Gallagher Plant fall within the "routine maintenance, repair and replacement" exemption found at 40 C.F.R. § 52.21(b)(2)(iii). Each of these changes was an expensive capital expenditure performed infrequently at the Gallagher Plant that constituted the replacement and/or redesign of a boiler component with a long useful life. In each instance, the change was performed to either regain lost capacity, extend the useful life of the unit, or both.
43. None of the modifications at the Gallagher Plant fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) for an "increase in the hours of operation or in the production rate." This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
44. None of the modifications at the Gallagher Plant fall within the "demand growth" exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because for each modification, a physical

change was performed which resulted in an emissions increase.

45. Therefore, Cinergy and PSI violated and continue to violate 40 C.F.R. § 52.21 and IAC 2-1 by constructing and operating modifications at the Gallagher Plant without the necessary permit required by the Indiana SIP.
46. Each of the violations has continued from the start of construction of the modification and will continue until Cinergy or PSI obtains the appropriate permit and installs and operates the necessary pollution control equipment to satisfy the Indiana SIP.

Miami Fort Facility

47. [REDACTED] Cinergy and CG&E "modified" the Miami Fort plant as defined by § 52.21(b). These modifications included, but are not limited to, the following project: [REDACTED]
48. Cinergy and/or CG&E commenced construction of the modification identified in Paragraph 47 as defined in the Ohio SIP, 40 C.F.R. § 52.21(b), and have operated the source as modified since 1990 through the date of this NOV.
49. The modification recited in Paragraph 47 resulted in a "significant net increase" in NO_x emissions, SO₂ emissions, or both, as defined at 40 C.F.R. § 52.21(b)(3) and (23).
50. Neither Cinergy Corporation nor CG&E obtained a PSD permit prior to constructing this modification to the Miami Fort plant as required by 40 C.F.R. § 52.21, a NNSR permit pursuant to OAC 3745-31, nor a minor NSR permit pursuant to OAC 3745-31. In addition, no documentation was provided to the permitting agency of actual emissions after the modification, as required by 40 C.F.R. § 52.21(b)(21)(v).
51. The modification at the Miami Fort plant did not constitute "routine maintenance, repair and replacement" and therefore was not exempt from PSD requirements pursuant to 40 C.F.R. § 52.21(b)(2)(iii) and OAC 3745-31. The change constituted replacement of a boiler component with a long useful life and involved a substantial capital expenditure. The modification was performed to increase capacity, regain lost capability, and/or extend the useful life of the unit. The utility industry has known that the "routine maintenance, repair and replacement" exemption does not apply to capital expenditures of this nature since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. ("WEPCO") facility. EPA's interpretation of this exemption was upheld by the court of appeals in 1990. Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).
52. The modification at the Miami Fort plant does not fall within the exemption found at 40 C.F.R. § 52.21(b)(2)(iii)(f) and OAC 3745-31 for an "increase in the hours of operation or

in the production rate ” This exemption is limited to stand-alone increases in operating hours or production rates, not to construction activity which causes such increases to occur. The utility industry has known that this exemption does not apply where the increases in hours of operation or in production rate is caused by construction activity, since at least 1988 when EPA issued a widely publicized applicability determination regarding utility modifications at a Wisconsin Electric Power Co. (“WEPCO”) facility. EPA’s interpretation of this exemption was upheld by the court of appeals in 1990 Wisconsin Electric Power Co. v. Reilly, 893 F.2d 901 (7th Cir. 1990).

53. The modification at the Miami Fort plant does not fall within the “demand growth” exemption found at 40 C.F.R. § 52.21(b)(33)(ii) because the emissions increase which occurred after the modification resulted from it.
54. Therefore, Cinergy Corporation and CG&E violated and continue to violate 40 C.F.R. § 52.21 and the Ohio SIP by constructing and operating a major modification at the Miami Fort plant without first obtaining the necessary permits required by the Ohio SIP.
55. The violation has continued from the start of construction of the modification and will continue until Cinergy or CG&E obtains the appropriate permit and installs and operates the necessary pollution control equipment to satisfy the Ohio SIP.

ENFORCEMENT


Pursuant to Section 113(a)(1) of the Act, at any time after the expiration of 30 days following the date of the issuance of this Notice, the Regional Administrator may, without regard to the period of violation, issue an order requiring compliance with the requirements of the SIPs or bring a civil action pursuant to Section 113(b) for injunctive relief and/or civil penalties of not more than \$25,000 per day for each violation before January 30, 1997, and no more than \$27,500 per day for each violation after January 30, 1997. See 31 U.S.C. § 3701.

OPPORTUNITY FOR CONFERENCE

Respondents may, upon request, confer with EPA. The conference will enable Respondents to present evidence bearing on the finding of violation, on the nature of violation, and on any efforts they may have taken or propose to take to achieve compliance. Respondents have a right to be represented by counsel. Respondent must make any request for a conference within 10 days of receiving this Notice, and should make the request for a conference or other inquiries concerning the Notice in writing to:

Sarah Graham
U.S. Environmental Protection Agency
Air and Radiation Division
77 W. Jackson Blvd. (AE-17J)
Chicago, IL 60604
(312) 886-6797

3/31/2004
Date


Stephen Rothblatt, Director
Air and Radiation Division

CERTIFICATE OF MAILING

I, Betty Williams, certify that I sent a Notice of Violation, No. EPA-5-04-19-IN/OH, by

Facsimile on 03/31/04 and by Certified Mail, Return Receipt Requested, to:

Mr. James Rogers, CEO
Cinergy Corporation
PSI Energy, Inc.
Cincinnati Gas & Electric Co.
139 East Fourth Street
Cincinnati, Ohio 45201

I also certify that I sent copies of the Notice of Violation by first class mail to:

Felicia Robinson, Assistant Commissioner
Office of Enforcement
Indiana Department of Environmental Management
100 North Senate Avenue, Room 1001
Indianapolis, Indiana 46206-6015


Robert Hodanbosi, Chief
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Ohio Environmental Protection Agency
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Barbara Gambill
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Julie Ezell
Cinergy Services, Inc.
1000 East Main Street
Plainfield, Indiana 46168-1782

on the 15th day of April, 2004.


Betty Williams, Secretary
AECAS (IL/IN)

CERTIFIED MAIL RECEIPT NUMBER: 70010320000601784384